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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

against

THE THOMPSON CONSTRUCTION CORP. and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

PETITIONER'S REPLY BRIEF

IRVING LEVINE,
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PETITIONER'S REPLY BRIEF

I.

The bare issue here is whether the subcontractor's letter of January 9, 1957 (19a-20a) addressed to and received by the prime contractor Thompson (20a; 22a-23a) and sent at petitioner's request (19a), when considered in conjunction with (1) Thompson's knowledge of its subcontractor's financial difficulties on the job (16a-18a) and (2) petitioner's delivery of material to said job (17a), are sufficient to render Thompson and the Surety liable on their Miller Act Bond. The issue at bar is strictly one of law, since the facts are not in dispute (10a-15a).

Respondents' reliance upon the *Bowden* and *Old Dominion* cases (Respondents' Brief, pp. 2, 3) is misplaced. These cases are readily distinguishable from the case at bar.

In *Bowden* (239 F. 2d 572—9th Cir. 1956, Cert. Den. 353 U.S. 957), which respondents assert is "most similar", the Court of Appeals there said:

> "The writing must be sent or presented to the prime contractor by or on the authority of the supplier."

At bar, the letter of January 9th was sent "on the authority of the supplier". In *Bowden*, too, the materialman had no knowledge that a claim was being presented to the prime contractor by the subcontractor, on the materialman's behalf.

In the *Old Dominion* case (CCA 3rd, 1959, 272 F. 2d 73), the supplier was similarly unaware of the presentation of a claim on his behalf to the prime contractor by the subcontractor. The Court of Appeals there held, in reversing a judgment for the supplier:

> "* * * we find that the plaintiff here did nothing to secure the protection and benefits afforded him by the Act." (The uncontradicted proof shows that petitioner at bar intended the letter of January 9th as the presentation of a claim to the prime contractor (19a).)

Additionally, it should be observed that in the *Bowden* and *Old Dominion* cases, there were not presented two factors urged upon the Courts below: (1) Thompson's knowledge of his subcontractor's financial insecurity and (2) Thompson's knowledge of petitioner's deliveries of material to the job. Nevertheless, if we accept respondents' argument at face value that the *Bowden* and *Old Dominion* cases are controlling authorities against the petitioner, then it must be concluded that a serious conflict exists between the Court of Appeals in the Second Circuit and the Court of Appeals in different circuits holding to the contrary (infra).

II.

In construing a remedial statute, such as the Miller Act, it is respectfully submitted that the required statutory 90-day notice is valid so long as it substantially complies with the statute (see cases cited, pp. 7-11, Petition).

Respondents take issue with petitioner's characterization of the January 9th letter (21a) as an assignment to petitioner of moneys due from Thompson to the subcontractor Greene (Respondents' Brief, pp. 3, 4). If the letter be deemed a conditional assignment to petitioner of moneys due Greene, that is, conditional in the sense that Thompson's approval was necessary to impart validity, yet uncontradicted facts demonstrate that notwithstanding any right in Thompson to reject this assignment, Thompson did not exercise such right. Indeed, Thompson recognized said assignment seeking from the petitioner, however, proof of moneys due on the Government job here involved (14a-15a). ~~This conduct, on the Government job here involved (14a-15a).~~ This conduct, on the part of Thompson, constituted an effective waiver of the provision in its subcontract with Greene prohibiting assignments, etc. (see *Sillman* v. *20th Century Fox Film Corporation*, 3 N.Y. 2d 395, 403, and cases therein cited). The question may then be put—If a 90-day Miller Act notice specifies the amount claimed to be due the supplier, with substantial accuracy and the name of the subcontractor to whom the material was supplied, is the notice thereby rendered invalid if, additionally, it also purports to assign moneys to the supplier? The answer should be in the ~~affirmative~~ negative, contrary to the holding below. Otherwise, a prime contractor on a Government project would be virtually absolved from making any kind of inquiry or assuming any burden as, indeed, the Court below held.

III.

Lower courts should not be alert to strike down Miller Act claims at the slightest provocation. This is not the sense of the Statute. At bar, as in the companion *Reiss* case, the materialmen have been denied recovery although there is no question that deliveries were in fact made to the government projects, which remain unpaid. The petitioner, therefore, has been turned out of court on a highly technical construction of a remedial statute. It is difficult, if not impossible to reconcile the authorities in the *Bowden* and *Old Dominion* cases and the holding, at bar, with such cases as: *Moyer* v. *U.S.* for use of *Trane Co.* (206 F. 2d 57 (4th Cir., 1953)); *Birmingham Slag Co.* v. *Perry* (115 F. 2d 724 (5th Cir. 1940)); *Hopper Bros. Quarries* v. *Peerless Casualty Co.* (255 F. 2d 137, 144 (8th Cir., 1958), cert. den. 358 U.S. 831); *McWaters Bartlett et al.* v. *U.S.A.* for the use and benefit of *Wilson* (272 F. 2d 291 (10th Cir., 1959)) and *Houston Fire & Casualty Insurance Co.* for the use and benefit of the *Trane Co.* (217 F. 2d 927 (5th Cir., 1954)).

An irreconcilable conflict exists which, it is respectfully submitted, should be corrected by the Supreme Court.

The questions involved at bar are of considerable importance. They certainly affect, in one way or another, all government construction. A writ should therefore issue as prayed for in the Petition.

Dated: April 8, 1960.

Respectfully submitted,

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Proof of Service.

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of April, 1960, I served three (3) copies of the foregoing Petitioner's Reply Brief on the Respondents, The Thompson Construction Corp. and Standard Accident Insurance Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorney of record, Joseph Edward Davey, Jr., Esq., 115 Broadway, New York, N. Y.

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